Supreme Court, U.S.
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No. 92-311

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

LOUIS W. SULLIVAN, Secretary of Health and Human Services,

Petitioner,

v.

RICHARD H. SCHAEFER,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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October 16, 1992

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QUESTIONS PRESENTED

1. Was the court of appeals below correct in holding that respondent's fee application under the Equal Access to Justice Act was timely, where the district court had remanded the case to the agency for further proceedings, resulting in an award of disability benefits to respondent, and respondent's fee application was filed prior to the district court's issuance of a post-remand judgment?

2. If not, should this Court's ruling be given prospective effect only because when respondent filed his fee application it was timely under all then-existing precedent and all of the agency's pronouncements on the subject?

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RESPONDENT'S BRIEF IN OPPOSITON

Statement of the Case

In June 1986, respondent Richard H. Schaefer filed an application for social security disability benefits under Title II of the Social Security Act, 42 U.S.C. § 401 *et seq.*, which was denied at the administrative level by petitioner Secretary of Health and Human Services (the "Secretary"). Respondent then sought review under 42 U.S.C. § 405(g) in the United States District Court for the District of Minnesota which, on April 5, 1989, reversed the Secretary's decision on various legal grounds, denied both

parties' motions for summary judgment, and remanded for further administrative proceedings (Pet. App. 27a). The court did not at that time enter a separate judgment pursuant to Federal Rule of Civil Procedure 58.

Thereafter, pursuant to the district court's ruling, the Secretary considered the case anew, and, on January 31, 1990, an administrative law judge ("ALJ") determined that respondent was disabled (Pet. App. 10a). When the Secretary's Appeals Council did not review that determination within the time allowed by law (*id.*), *see* 20 C.F.R. §§ 404.983, .984, the Secretary issued an award certificate to respondent (Pet. App. 10a). Shortly thereafter, respondent moved for entry of a final judgment in the district court and filed an EAJA application for an award of attorney's fees for 18.3 hours spent securing respondent's entitlement to benefits (*id.*).

The procedural history of the fee dispute described in the Petition (at 6-8) is largely accurate, and we will not repeat it. The district court (Pet. App. 9a), affirming the magistrate's recommendation (Pet. App. 15a-18a), held that respondent was entitled to an award of attorney's fees under the EAJA because the Secretary's position in the litigation was not "substantially justified," *see* 28 U.S.C. § 2412(d)(1)(A), a finding that the Secretary did not challenge in the court of appeals. Both the district court and the court of appeals rejected the Secretary's claim advanced here that respondent's application was untimely for the reasons set forth in the Petition.

Two facts omitted from the Petition are noteworthy. First, respondent's decision to seek fees only after the administrative proceedings on remand had been completed was fully consistent with, *indeed demanded by*, applicable law. *See, e.g., Swedberg v. Bowen*, 804 F.2d 432, 434 (8th Cir. 1986); *accord Sullivan v. Hudson*, 490 U.S. 877, 887 (1989). Moreover, the Secretary himself, through regulations and in litigation, had specifically endorsed that

approach. *See Brown v. Sec'y of HHS*, 747 F.2d 878, 887 (3rd Cir. 1984); 54 Fed. Reg. 37,789, 37,791 (1989).

Second, it is *respondent's* money, not his lawyer's, that is at stake here. The district court, as required by law, specifically ordered respondent's attorney to refund the EAJA fee to respondent, allowing the attorney to retain only a contingent fee from respondent's back benefits (Pet. App. 9a). *See* Pub. L. No. 99-80, § 3 (1985), 99 Stat. 186 (28 U.S.C. § 2412 note)(requiring refund of smaller award to claimant). Thus, a reversal here would diminish respondent's disability recovery, even though the Secretary's position on the merits was unreasonable.

The issue in this case is whether, in a social security disability case remanded for further administrative proceedings under the fourth sentence of 42 U.S.C. § 405(g), a claimant may file an application for attorney's fees under the Equal Access to Justice Act ("EAJA"), 28 U.S.C. § 2412(d), after a favorable conclusion of the remand proceedings, as the court of appeals held, or, as the Secretary argues, whether every claimant who obtains a sentence-four remand must file a fee application shortly after remand, before the claimant even knows if he or she has prevailed.

As we explain in Part A below, although one court of appeals disagrees with the approach taken below, the split is not sufficiently important to warrant this Court's time and resources, especially because the issue does not affect the substantive rights of social security claimants or their attorneys, nor does it bear on any policies Congress sought to advance in enacting the EAJA. Moreover, if the issue needs resolution, Congress, rather than this Court, is the preferable forum in which to resolve it.

Ordinarily, we would respond to the Petition simply by explaining why review should be denied. But this is not the usual case. The Solicitor General has not only asked for a writ of certiorari, but for summary reversal, despite

the extreme complexity of the issues presented and the fact that the Secretary's position is at odds with virtually all of the decisions of the lower courts. *See Labrie v. Sec'y of HHS*, No. 92-1066, slip op. at 12-15 (1st Cir. Sept. 30, 1992)(discussing cases). However, because of the government's request, we are constrained to explain in Part B why the Secretary's position on the merits is incorrect and why, even if it were correct, the ruling should not be applied retroactively. At the very least, that discussion makes clear that the issues here are ill-suited for summary disposition.

A. This Court Should Deny Review.

Respondent concedes that there is a split in the circuits. The court below, following its previous decision in *Welter v. Sullivan*, 941 F.2d 674 (8th Cir. 1991), held that the district court may, after remanding a case pursuant to sentence four of 42 U.S.C. § 405(g), hold its judgment in abeyance until after the administrative remand proceedings are completed, at which time the claimant, *if* he or she has prevailed, may file an EAJA fee application (Pet. App. 1a-2a). *Accord Labrie*, *supra*; *Gutierrez v. Sullivan*, 953 F.2d 579 (10th Cir. 1992), *cert. pending*, No. 92-361. The Fifth Circuit, on the other hand, has held that the EAJA's statute of limitations is triggered immediately by a sentence-four remand. *Luna v. Dep't of HHS*, 948 F.2d 169 (1991). These cases all purport to apply this Court's recent decision in *Melkonyan v. Sullivan*, 111 S. Ct. 2157 (1991), and its predecessor decisions, *Sullivan v. Finkelstein*, 496 U.S. 617 (1990), and *Sullivan v. Hudson*, 490 U.S. 877 (1989). As we now explain, despite this split in authority, there is no reason for this Court to grant review in this case.

1. This Court's decision in *Melkonyan* was issued only a little more than a year ago and because of the nature of the circuit split, there is no reason for this Court to enter the fray so soon thereafter. The fact that there are

different rules currently in place in the Eighth and Fifth Circuits is completely tolerable and, despite petitioner's conclusory assertion to the contrary (Pet. 18), will have no lasting impact on petitioner's administration of either the Social Security Act or the EAJA.

Because fee litigation occurs after the merits of a dispute have been adjudicated or otherwise resolved, it does not directly affect the primary behavior either of the litigants before the court or of other people whose substantive conduct Congress wishes to influence. To be sure, some fee decisions may have an impact on the ability of litigants to hire attorneys, either by making it easier or harder to obtain a reasonable fee.

Here, however, the only question is the *timing* of the fee application, not the *availability* of fees. The EAJA's beneficent purposes are simply unaffected by differing rules governing the EAJA's limitations period. Thus, while the lower courts have taken various approaches to this Court's decision in *Melkonyan*, as it applies to sentence-four cases, once that litigation has played itself out, there will be no confusion for claimants and their lawyers as long as they follow the law in the circuit in which they have filed. For instance, after the Fifth Circuit's decision in *Luna*, *supra*, claimants who obtain sentence-four remands know to file their fee applications within the next 90 days. If they fail to do so, it is *they*, not the Secretary, who will suffer the consequences, just like any other litigant who fails to follow procedural rules or precedents. *See Luna*, 948 F.2d at 173 n.5.

While we agree with the Secretary that he operates a very large adjudicatory system, in which there are many remanded cases each year (*see* Pet. 18), that fact has nothing to do with whether the split in the circuits creates problems for him. Differing statutes of limitations present no burden on the Secretary because the statute does not run against him. Social Security practitioners, on the

other hand, generally practice in one locality, and almost always within one circuit, and should have no problem understanding the applicable rule once it is established.

There are well over 100 federal fee-shifting statutes, *see Marek v. Chesny*, 473 U.S. 1 (1986)(appendix to opinion of Brennan, J., dissenting), and, to our knowledge, only the EAJA and a tax statute patterned on the EAJA, 26 U.S.C. § 7430, have statutes of limitations. With respect to the dozens of fee provisions that do not contain statutes of limitations, a myriad of local rules apply, many of which contain filing deadlines.[1] The circuit split presented here is far less difficult to navigate for litigants and their attorneys than are the requirements for other fee applications, given the variation among local practice rules. But the answer to the "problem" in both situations is the same: unless and until Congress acts to provide uniformity, lawyers will consult the appropriate rule and file their fee applications accordingly. Meanwhile, given the priority that ought to be given to matters of substantive concern, there is no pressing need for this Court to attempt to impose a nationwide EAJA filing deadline in a subcategory of cases remanded to the agency for further proceedings under the Social Security Act.

2. Even if the split in the circuits was as intolerable as the Secretary suggests, there is a second reason why this Court should decline to hear this case. The resolution of the question presented is not the simple one-issue case that the Secretary's one-paragraph request for summary reversal suggests (Pet. 18-19). We completely disagree with the Secretary's conclusion as to when a fee application should be filed and resolved in a sentence-four case, and, as we show in Part B below, a careful review of the statute's relevant language shows that the Eighth Circuit's decision was correct.

[1] *See, e.g.*, Fed. Cir. R. 47.9(a)(10 days after judgment); 9th Cir. R. 39-1.6 (30 days after judgment, except where party has asked for rehearing, in which case, 14 days after denial of rehearing); 8th Cir. R. 47C (14 days after judgment); S.D. Ohio L.R. 54.2 (30 days after judgment); D.D.C. Rule 215 (no filing deadline, but status conference ordinarily within 60 days of judgment); E.D. and W.D. Ark. R. 27(a)(14 days after judgment).

But if this Court *were* to grant review, it would have to deal comprehensively with the difficulties engendered by this Court's decisions in *Finkelstein* and *Hudson*, as well as *Melkonyan*. Thus, the Court would need to determine not only when a sentence-four fee application should be filed, but whether a claimant is a prevailing party entitled to fees by virtue of obtaining a sentence-four remand alone. That issue has divided the lower courts, but, unlike the issue discussed above, it presents a serious substantive question for this Court to resolve.[2] The Court will also need to determine whether the rule in *Hudson* — that work done in post-remand administrative proceedings are compensable under the EAJA — applies in sentence-four cases. Although we strongly believe that it does (particularly because *Hudson* itself was a sentence-four case), the courts have disagreed on that issue.[3]

In addition, there are questions as to what is meant by a "final" judgment under the EAJA, which have continued to plague the courts. In particular, the courts have come to different conclusions about when the 30-day filing period begins to run when the government purports to

[2] *Compare, e.g., Spurlock v. Sullivan*, 783 F. Supp. 474, 479 (N.D. Cal.)(claimant prevails and is eligible for fees by virtue of winning remand), *reaffirmed*, 790 F. Supp. 979, 980 (N.D. Cal. 1992), *with Van Tassel v. Sullivan*, 789 F. Supp. 1108, 1108-09 (D. Colo. 1992)(fee application filed after remand order premature; must wait to file until after plaintiff prevails on remand).

[3] *Compare, e.g., Spurlock*, 783 F. Supp. at 479 (*Hudson* fees not available in sentence-four cases), *with Heredia v. Sec'y of HHS*, 783 F. Supp. 1550, 1558 (D. Puerto Rico 1992)(*Hudson* fees available in sentence-four cases); *Linkins v. Sullivan*, 779 F. Supp. 1324, 1327 (M.D. Fla. 1991)(same). *See generally Labrie v. Sec'y of HHS*, No. 92-1066, slip op. at 11 n.8, ___ F.2d ___ (1st Cir. Sept. 30, 1992)(discussing problem).

settle a case or otherwise indicates that it will not appeal.[4] Further, if the Secretary is correct and every sentence-four remand immediately starts the running of the filing period, the Court should also address whether its ruling should be given prospective application only, since it would catch thousands of claimants unaware.

Indeed, the immediate filing rule contradicts the directives that the Secretary still to this day gives claimants who obtain such remands (*see infra* App. 2a-3a)(form sent by Secretary to claimants in remand cases stating that the U.S. Attorney will return to district court for further proceedings after administrative remand is completed), which presents another issue for this Court and another basis for affirmance. *See infra* 18-23. Moreover, the retroactivity issue will soon pass as the circuits fall into line, and the Secretary has it fully within his power to eliminate any charge of misleading claimants by unilaterally revoking the advice that he gives claimants that he now believes is incorrect, thereby partially simplifying any future case that the Court might feel compelled to take on this issue.

Finally, the Court will need to revisit its 1990 decision in *Finkelstein*, 496 U.S. 617, which held that the merits of a sentence-four remand judgment are immediately appealable by the Secretary, but in the same breath stated that EAJA timeliness questions were separate and distinct. *Id.* at 628-31 & n.8. Contrary to the Secretary's position, there is nothing in *Melkonyan* that forbids the district court from, in effect, holding its fourth-sentence judgment in abeyance pending the administrative remand proceedings — the approach endorsed by the Eighth Circuit and by this Court in *Hudson*. *See* 490 U.S. at 887; *see also*

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[4] *Compare Myers v. Sullivan*, 916 F.2d 659 (11th Cir. 1990), and *Baker on Behalf of Baker v. Sullivan*, 956 F.2d 234, 235-36 (11th Cir. 1992), *with Fed'l Election Comm'n v. Political Contributions Data, Inc.*, No. 89 Civ. 5238 (SWK), slip op. at 5-8, ___ F. Supp. ___ (July 30, 1992).

Hafner v. Sullivan, No. 91-1634, slip op. at 6 n.3, 972 F.2d 249, ___ n.3 (8th Cir. Aug. 11, 1992)("As a matter of statutory construction and common sense, we see no reason why an appealable 'final judgment' under § 405(g) must necessarily be a 'final judgment' for purposes of § 2412(d)(1))(B)"). But according to the Secretary, *Finkelstein*'s holding on appealability applies to the EAJA, and requires that the statute of limitations starts to run immediately in every sentence-four case, no matter how inconsistent that may be with the orderly presentation of a fee application (*see infra* at 12-14).

Fortunately, there is no reason for this Court again to become enmeshed in this morass, which, as *Hudson*, *Finkelstein*, and *Melkonyan* show, lends itself to no easy *judicial* solution. *Congress*, not this Court, should have the opportunity to fix whatever problems remain after *Melkonyan*. One easy and obvious solution is to repeal the limitations period, which appears in only two federal fees statutes. Recently, the Administrative Conference of the United States formally recommended that the EAJA's statute of limitations either be repealed or run only from the completion of the administrative remand proceedings, and that recommendation has been transmitted to the relevant committees of Congress for consideration and published in the *Federal Register*. *See* 57 Fed. Reg. 30,101, 30,109 (July 8, 1992)(to be codified at 1 C.F.R. § 305.92-5). Congress may well choose a different solution, but whatever path Congress takes, it will be able to consider *all* of the difficulties at once. We are concerned that this Court should not, and cannot, comprehensively resolve these problems through case-by-case adjudication. Because this case does not present a significant substantive issue, nor any procedural issue bearing on the behavior that Congress wished to encourage or discourage in enacting the EAJA, we respectfully urge this Court to deny review.

B. The Proper Result is Affirmance, Not Reversal.

If this Court does grant review, plenary consideration is imperative. The post-*Melkonyan* case law makes clear that the issues here are not simple ones. As we now demonstrate, the Eighth Circuit's decision was correct, and the Secretary's view as to how a sentence-four remand case should be handled has no basis in the statutory language and defies common sense.

1. The Eighth Circuit's decision here was based on its eminently reasonable prior ruling in *Welter v. Sullivan*, 941 F.2d 674, which fully considered *Melkonyan*. In *Welter*, the court held that the district court's sentence-four *remand* did not constitute the sentence-four *judgment*, because the district court intended to retain jurisdiction and issue its judgment thereafter (Pet. App. 5a-6a). This is consistent with Rule 58 of the Federal Rules of Civil Procedure and both *Melkonyan* and *Hudson*.[5]

In *Hudson*, this Court held that work done in post-remand administrative proceedings is compensable under the EAJA because that work is necessary to the vindication of the claimant's rights. 490 U.S. at 885-90. As *Hudson* makes clear, the case there was not remanded because the Secretary requested a remand prior to filing his answer or because the district court found "good cause" for the taking of newly discovered "material" evidence (the only predicates for a sentence-six remand). Rather, the decision was reversed and remanded because the Secretary had ignored his own regulations and had failed to consider the cumulative effect of the claimant's disabilities (*id.* at 880-81) — a quintessential fourth-sentence remand. *See Labrie*, slip op. at 11 (Secretary concedes *Hudson* involved sentence-four remand).

[5] The Eighth Circuit has recently reaffirmed *Welter* in *Hafner v. Sullivan*, No. 91-1634, 972 F.2d 249 (Aug. 11, 1992).

Despite the fact that *Hudson* was remanded under sentence four, this Court specifically noted that the district court had entered a post-remand judgment of dismissal, *at* the Secretary's behest. *Hudson*, 490 U.S. at 881-82. The claimant then filed a fee application, which no one even intimated was untimely, and this Court affirmed an award of fees, both for in-court work and for counsel's time before the Secretary on remand. On the latter point, this Court held that the post-remand work was compensable because it was necessary "to the ultimate vindication of the claimant's rights . . .[,]" *id.* at 890, and repeatedly noted the district court's ability to retain jurisdiction in order to protect those rights. *Id.* at 886.

Significantly, *Finkelstein* and *Melkonyan* specifically reaffirmed *Hudson*. *Melkonyan*, 111 S. Ct. at 2162; *Finkelstein*, 496 U.S. at 629-31; *see Labrie*, slip op. at 17. The principal *holding* in *Melkonyan* was that a "final judgment" under 28 U.S.C. § 2412(d)(1)(B), may only be issued by a court, not an administrative agency, rejecting the Secretary's position that a post-remand decision of the Social Security Administration can be a "judgment" under the EAJA, thus starting the statute of limitations. 111 S. Ct. at 2162. The Court also agreed with the parties that the district court's remand was *not* one under sentence four, *id.* at 2163, and went on, in dicta, to say that "[i]n sentence four cases, the filing period begins after the final judgment ('affirming, modifying, or reversing') is entered by the court and the appeal period has run, so that the judgment is no longer appealable." 111 S. Ct. at 2165 (emphasis added).

Here, the district court did not issue a *judgment* when it ordered a remand, realizing that it ought to retain jurisdiction until after it was determined whether the claimant had prevailed, as *Hudson* holds is usually appropriate. 490 U.S. at 886-87. Rather, it simply remanded the case under sentence four of 42 U.S.C. §

405(g), but postponed entry of its sentence-four judgment, and thus the running of the EAJA's statute of limitations, until after the administrative proceedings were completed. This is fully consistent with *Melkonyan*, which noted that, in order to trigger the statute of limitations, there must be a judgment "accompany[ing]" the post-remand order. 111 S. Ct. at 2165. Here, there was no judgment "accompanying" that order prior to the completion of the post-remand proceedings. *Accord Mendez v. Sullivan*, 792 F. Supp. 375, 378 (E.D. Pa. 1992). The court of appeals' decision is, thus, fully consistent with Rule 58 of the Federal Rules of Civil Procedure, which requires that the district court issue a separate judgment, *i.e.*, separate from the order remanding the case to the Secretary. *Id.*; *see also Labrie*, slip op. at 18.[6]

2. The Eighth Circuit's decision also makes practical sense. By holding its judgment in abeyance until the post-remand proceedings were completed, the district court was able to effectuate *Hudson* — *i.e.*, the court could determine whether the claimant had prevailed and, if so, whether he or she was entitled to fees for the post-remand proceedings. *Accord*, *Hafner*, slip op. at 5-6, 972 F.2d at ___. On the other hand, the rule suggested by the Secretary makes no sense. In this case, for instance, the Secretary complains that respondent's EAJA application was filed more than a year after the district court's remand order (Pet. 18-19). But it is inconceivable that the claimant could have done anything else but wait for the completion of the post-remand proceedings, since he had not yet prevailed, at least as the law stood at that time, because he had not yet been awarded any benefits. *See Hudson*, 490 U.S. at 887 (citing circuit precedent, including from Eighth Circuit).

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[6] Rule 58 provides in relevant part that "[e]very judgment shall be set forth in a separate document. A judgment is effective only when so set forth and when entered as provided in Rule 79(a)."

Although the Secretary agrees that respondent had not prevailed at that point (Pet. 15-16), he argues, nevertheless, that the statute of limitations began to run when the remand order was entered. Thus, under the Secretary's "file early and often" view, the claimant must file a "protective" EAJA application in *every* sentence-four remand case and then await the completion of administrative proceedings. Then, *if* the claimant prevails on remand, the court may award attorney's fees (presumably after reviewing the remand proceedings). *Accord Hafner*, slip op. at 6, 972 F.2d at ___.

To put it bluntly, this scheme is ridiculous and, not surprisingly, finds little support in the post-*Melkonyan* case law. First, it completely ignores the terms of the EAJA itself, which require fee applicants to "allege that the position of the United States is not substantially justified[,]" and "show[ ] that the party is a prevailing party . . .." 28 U.S.C. § 2412(d)(1)(B). But, according to the Secretary, the claimant has not prevailed by obtaining a sentence-four remand, but must prevail on remand in order to meet that requirement. Therefore, the fee application simply cannot make the allegations required by the EAJA. Indeed, a claimant cannot "allege" a lack of substantial justification or "show" that he or she has prevailed, consistent with Rule 11 requirements, if he or she has not yet done so.

Second, as we have shown above (*supra* at 10-11), the Secretary's insistence on the filing of an EAJA application in every case is inconsistent with *Hudson*, in which there was a sentence-four remand, but the fee application was not filed until the post-remand proceedings had been completed. Moreover, *Melkonyan*, by repeatedly stating that prevailing party status is a prerequisite to the filing of a fee application, 111 S. Ct. at 2159, 2161, 2163, also strongly suggested that the filing of the fee application will coincide with the attainment of prevailing party status.

The best way to make sense of *Hudson* and *Melkonyan* is to allow, but not require, the district court to postpone issuing its sentence-four judgment until after the post-remand proceedings are completed, as the Eighth Circuit held here.

Finally, the Secretary's position would be unbelievably inefficient. It would require that, in *every* fourth-sentence remand case, the claimant file a fee application before he or she knew what the results of the post-remand proceedings were. Courts would thus be inundated with fee applications, even though, under the Secretary's view, many of these claimants will not even prevail in the post-remand proceedings. If the claimant loses on remand before the agency, there might be further judicial review of the merits of the action, and thus the fee application, might never, or only well into the future, be considered. "Thus, the Secretary's position would require the claimant to file an anticipatory EAJA petition at a time when it either must be denied or indefinitely suspended — the ultimate in laying traps for the unwary and senselessly cluttering court dockets." *Hafner*, slip op. at 4, 972 F.2d at ___. Absent clear language mandating such a result, the Court should not assume that Congress created such a preposterous scheme. To the contrary, not only is that language lacking here, but there is very strong evidence that Congress envisioned that fee applications would be filed only after the post-remand proceedings were completed, precisely as the Eighth Circuit held here. *See* H.R. Rep. No. 120, pt. 1, 99th Cong., 1st Sess. 19 (1985), 1985 U.S.C.C.A.N. 148. Given these absurdities, all doubts should be resolved against the Secretary's interpretation of the EAJA.[7]

[7] According to the Secretary's own data (Pet. 18 n.12), adoption of his position would involve the filing of thousands of superfluous fee applications, since ***non-prevailing*** parties, or at least not-yet prevailing parties, must file fee applications in order to be timely. A claimant's attorney could, of course, opt not to file a fee application at all, but that could pose a serious ethic

3. If, as the Secretary believes, *Melkonyan* mandates that the EAJA's statute of limitations is triggered in every sentence-four case by the issuance of the remand order, then the only sensible reading of *Melkonyan* is that a claimant who wins a sentence-four remand is a prevailing party who may be awarded fees at that point. As we have stated, this comports with the EAJA's language, since the statute requires that the claimant have prevailed at the time the fee application is filed. 28 U.S.C. § 2412(d)(1)(B). Furthermore, it avoids the utter irrationality of the system urged by the Secretary, in which claimants who have not prevailed, *and may never prevail*, must file fee applications in order to meet the statute of limitations (but for no other reason).

Although the Secretary blithely states in one short paragraph that the "answer" is so "clear" that the Court should reverse summarily (Pet. 18-19), he does not even cite the growing body of case law that holds that a claimant who has obtained a sentence-four remand has prevailed for EAJA purposes.[8] In *Dow v. Sullivan*, 774 F. Supp. 46 (D. Me. 1991), for example, the court held that:

> [a] sentence four remand terminates the "civil action" for which fees are available under 2412(d)(1)(A) [of the EAJA]. The "civil action" is

problem, since that attorney is obligated by law to return to the claimant the smaller of the EAJA fee and the contingent fee awarded under 42 U.S.C. § 406(b)(1). *See* Pub. L. No. 99-80, § 3 (1985), 99 Stat. 186 (28 U.S.C. § 2412 note). In this case, respondent's attorney was awarded a contingent fee and ordered to pay the smaller EAJA fee to respondent (Pet. App. 9a).

[8] *See, e.g., Thomas for Brown v. Sullivan*, 785 F. Supp. 788, 792 (C.D. Ill. 1992); *Rollins v. Sullivan*, 784 F. Supp. 253, 254, 258 (E.D. Pa. 1992); *Spurlock v. Sullivan*, 783 F. Supp. at 479; *Mills v. Sullivan*, 782 F. Supp. 1347, 1349 (W.D. Mo. 1992); *Sesker v. Sullivan*, 779 F. Supp. 1042, 1044 (W.D. Mo. 1991); *Audette v. Sec'y of HHS*, 776 F. Supp. 84, 91 (D.R.I. 1991); *Dow v. Sullivan*, 774 F. Supp. 46, 48-49 (D. Me. 1991); *see also Luna v. Dep't of HHS*, 948 F.2d 169 (5th Cir. 1991)(by implication).

> in fact terminated by our decision to reverse the Secretary and the Plaintiff has "prevailed" in this case. That is, the Plaintiff has succeeded in achieving substantially all of the benefit he sought in bringing the litigation, namely a reversal of the Secretary's decision.

Id. at 48-49 (footnote omitted). In *Audette v. Sec'y of HHS*, 776 F. Supp. 84 (D.R.I. 1991), the court was even more explicit:

> [U]nder sentence four the remand effectively ends speculation as to the final result. According to *Melkonyan*, a sentence four remand does make the claimant a prevailing party.

Id. at 91 (rejecting dicta to the contrary in *Fergason v. Sullivan*, 771 F. Supp. 1008, 1012 (W.D. Mo. 1991)).

As we have indicated, we believe that the Eighth Circuit's approach is more sensible and comports with this Court's decision in *Hudson*. But while it may seem anomalous to accord a claimant prevailing party status before the completion of post-remand proceedings, if the timing question is resolved as the Secretary urges, it is consistent with both § 405(g) and the EAJA that a claimant who obtains a remand under sentence four (but not an award of benefits) has prevailed for EAJA purposes at that point, because the government's position has been rejected by the court as a matter of law. This is so even though a claimant who obtains a sentence-six remand has not prevailed, because, under sentence six, the court "does not in any way rule as to the correctness of the administrative determination." *Dow*, 774 F. Supp. at 48. Indeed, frequently a sentence-six remand occurs because the claimant wants to present information to the ALJ of which neither he nor the Secretary was even aware when the Secretary's original decision was made. *Finkelstein*, 496 U.S. at 626. It is only after the post-remand submission of a new administrative record required by

sentence six, and the post-remand review contemplated by sentence seven, that the court will be in a position fairly to judge the Secretary's decision.

In a sentence-four case, however, a court's decision to reverse or modify the Secretary's decision *always* signifies that the Secretary has violated the law, and so it makes sense to say, at that point, that the claimant has prevailed. *See Luna*, 948 F.2d at 171; *Dow*, 774 F. Supp. at 48-9. In *Finkelstein*, for example, the sentence-four remand was part and parcel of the district court's invalidation of a federal regulation concerning eligibility for survivors' benefits. 496 U.S. at 624. Here, the district court's remand was necessary, among other things, to comply with the Eighth Circuit's precedent-setting ruling on the evaluation of pain, which the ALJ's decision had violated (36a).[9] Thus, here, as in any case remanded under sentence four, the court sent the case back to the Secretary with instructions to follow the legal precepts that he had previously breached, something which never occurs in a sentence-six case.

This distinction between claimants who benefit from sentence-four and those who benefit from sentence-six remands — with the former prevailing immediately and the latter awaiting the completion of proceedings on remand and post-remand review — accords with the purposes of the EAJA. The Supreme Court has recognized that the EAJA was intended to "'curb[] excessive regulations and the unreasonable exercise of Government authority . . .'" *Comm'r, INS v. Jean*, 496 U.S. 154, 165 & n.14 (1990) (*quoting* and *citing* H. R. Rep. No. 96-1418, p. 12 (1980)); *see also Hudson*, 490 U.S. at 883. The Secretary's failure to follow the law here was a perfect example of the type

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[9] *See Polaski v. Heckler*, 739 F.2d 1320 (8th Cir.), *reaffirmed*, 751 F.2d 943, 948-50 (8th Cir. 1984), *remanded*, 476 U.S. 1167 (1986), *reaffirmed*, 804 F.2d 457 (8th Cir. 1986), *cert. denied*, 482 U.S. 927 (1987).

of government conduct that the EAJA was intended to discourage, and an award of fees based on the remand, without more, would have served the statute's purposes.

4. If this Court believes that the Eighth Circuit erred in allowing respondent to file his fee application after the post-remand proceedings were completed, that decision should not be applied in this case. Under *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971), a court may give only prospective effect to decisions that establish new rules of law or overrule clear past precedent, because retroactive application would be inequitable to the party before the court and others similarly situated.[10]

Turning to the proceedings below and the relevant legal landscape, retroactive application of a rule allowing

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[10] We recognize that, under the patchwork plurality in *James B. Beam Distilling Co. v. Georgia*, 111 S. Ct. 2439 (1991), a ruling cannot be applied prospectively here, if it were applied retroactively in *Melkonyan*, because *Beam* requires "pure prospectivity." *Id.* at 2448 (opinion of Souter, J.). However, the rule at issue here — the timing of fee applications in sentence-four remand cases — was not applied in *Melkonyan*, as both the parties and the Court agreed that the case there did not involve a sentence-four remand. 111 S. Ct. at 2163. *See, e.g., Rollins*, 784 F. Supp. at 257-58 (*Beam* does not bar prospective-only application of *Melkonyan*).

Further, the 30-day filing period is not a jurisdictional bar, like the one present in *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 379-80 (1981), which precludes the Court from engaging in retroactivity analysis. Rather, the provision here is worded virtually identically to 42 U.S.C. § 2000e-16(c), the statute of limitations considered in *Irwin v. Veterans Admin.*, 111 S. Ct. 453 (1990). There, the Court held, as a general matter, that once Congress has waived the government's immunity, equitable principles apply to the same extent as in a suit among private parties, and that, therefore, statutes of limitations in actions against the government are not jurisdictional. *Id.* at 457. Accordingly, because the EAJA is a waiver of the federal government's immunity to fees and litigation expenses, its 30-day filing period is not jurisdictional, and ordinary retroactivity principles control. *See Bacon v. Sec'y of HHS*, 786 F. Supp. 434, 438 (D.N.J. 1992)(EAJA's filing period not jurisdictional under *Irwin*); *Golbach v. Sullivan*, 779 F. Supp. 9, 11-12 (N.D.N.Y. 1991)(same); *see also Sansano v. Sullivan*, 788 F. Supp. 218, 225 (D.N.J. 1992)(rejecting Secretary's reliance on *Firestone*); *Rollins*, 784 F. Supp. at 256 (same).

a sentence-four remand to trigger the EAJA's limitations period "would be anomalous indeed." *Chevron Oil*, 404 U.S. at 107. The remand order was issued on April 4, 1989 (26a). Ninety days later, or July 3, 1989, was less than a month after this Court's June 12, 1989 decision in *Hudson*, which made clear that fee applications should post-date the administrative decision on remand. This was fully consistent with the law nationwide, including the Eighth Circuit. *See, e.g., Swedberg v. Bowen*, 804 F.2d 432, 434 (8th Cir. 1986); *see also Brown v. Sec'y of HHS*, 747 F.2d 878, 887 (3rd Cir. 1984)(court relied on the Secretary's promise that he would, as a matter of policy, "return to the district court and file a copy of the government's decision upon conclusion of *any* remand proceeding in which a claimant receives benefits") (emphasis in original).

On January 31, 1990, an ALJ found respondent to be disabled, and the Appeals Council did not review that ruling (Pet. App. 10a). An award certificate, determining the amount of benefits due respondent, was issued on June 12, 1990 (*id.*), and shortly thereafter, on July 17, 1990, respondent moved for entry of a final judgment and filed his EAJA application (*id.*). At no time prior to that point did the legal terrain portend that a sentence-four remand prior to a finding of disability could possibly trigger the filing deadline. The Secretary's position also remained constant, recognizing that the law required him, "at least for purposes of awarding attorney's fees" under the EAJA, to return to the district court, for a post-remand judgment to trigger the 30-day filing period. Secretary's Reply Brief at 12, *Sullivan v. Hudson*, 490 U.S. 877 (No. 88-616). Even in *Finkelstein* — which post-dated *Hudson* by about a year — the Secretary remained true to his prior position:

> Of course, it is appropriate for the Secretary to file *any* new decision awarding benefits with the

> court so that the court can consider whether attorney's fees should be awarded under the EAJA.

Secretary's Brief at 44 n.35, *Sullivan v. Finkelstein*, 496 U.S. 617 (No. 89-504)(emphasis added). It was not until *Melkonyan* was decided on June 10, 1991 that anyone could have conceivably thought that a fee application in a sentence-four case had to be filed shortly after the remand had occurred.

Moreover, elsewhere the Secretary has taken, and still takes, the position that a Social Security claimant has the absolute right to return to the district court on the merits and, therefore, presumably, for attorney's fees as well. 54 Fed. Reg. 37,789, 37,791 (1989). Furthermore, the forms *currently* used by the Secretary to inform claimants of ALJ decisions on remand, tell claimants that they have the right to return to the district court and that "we will forward a copy of the decision, and a transcript of the record in your case to the United States Attorney for filing with the court" (*infra* App. 2a-3a).

With this background in mind, we turn to the first of three *Chevron Oil* factors — whether the decision below established a new principle of law, either because it overruled clear past precedent or because it decided an issue of first impression the resolution of which was not clearly foreshadowed. 404 U.S. at 107. In applying this factor, we look to the law at the time that the underlying conduct, or the failure to act, took place. *Id*. at 106-09. There can be no question that, when the relevant event took place approximately two years before *Melkonyan* was decided — when respondent failed to divine the need to file his fee petition within 90 days of the issuance of the sentence-four remand in 1989 — the law unequivocally required the Secretary to return to the district court after remand to report the results of the proceeding, and thereby either continue or dismiss the pending civil action. Under the EAJA, it was equally clear that a final judgment from the district court after remand was necessary to trigger the 30-day limitations period, as the Secretary expressly told this Court in *Finkelstein*, and as the Court itself had indicated in *Hudson*. 490 U.S. at 887. Thus, a reversal of the decision below would establish a new principle of law, "by overruling clear past precedent on which litigants may have relied." *Chevron Oil*, 404 U.S. at 106.

Next, given the prior history of the 30-day rule and its purpose and effect, retroactive application of a new rule would plainly retard the purposes of the law. *Id*. at 106-07. Indeed, retroactive application would be inconsistent with the basic purposes of the EAJA which are to increase court access for individuals and to improve government policies. *Comm'r v. Jean*, 496 U.S. at 165 n.14. Moreover, retroactive application would be the very "trap for the unwary resulting in the unwarranted denial of fees" that Congress sought to eliminate in its 1985 EAJA amendments. H.R. Rep. No. 120, pt. 2, 99th Cong., 1st Sess. 6 n.26 (1985), *reprinted in* 1985 U.S.C.C.A.N. 156 n.26.

Finally, retroactive application would produce substantially inequitable results, *Chevron Oil*, 404 U.S. at 107, as the facts of this case illustrate. Petitioner's counsel below, a small firm practitioner in Anoka, Minnesota, took this case on a contingent basis. After pursuing his client's claim for several years, and after the Secretary failed to file the administrative decision with the district court, counsel moved for entry of a final judgment and EAJA fees at a point considered timely under a settled nationwide practice. To deny respondent the right to recoup the fee that he has already paid his attorney "would surely be inimical to the beneficent purpose of the Congress." *Chevron Oil*, 404 U.S. at 108.

Moreover, retroactive application also would be unjust to the numerous other claimants and their lawyers who would otherwise suffer from reversal here. Attorneys with

pending EAJA applications relied on settled law and should not be penalized for doing so. More fundamentally, claimants will be damaged severely because, although their attorneys may still obtain a fee in many cases, such as this one, from *their* past-due benefits under 42 U.S.C. § 406(b)(1), a reversal here will, if applied retroactively, negate any possibility of an EAJA fee, thus creating the potential that claimants will suffer substantial losses of needed disability benefits. As Judge Pollak has put it, "it is difficult to believe that . . . the Supreme Court would have ordered retroactive application of its newly announced rule [in *Melkonyan*], because such a decision would have left without a remedy a large number of Social Security claimants who had relied on existing law." *Rollins*, 784 F. Supp. at 258 (footnote omitted).

Thus, if this Court chooses to reverse, it should give its ruling prospective effect only because, as in *Chevron Oil*, the "equities require[] nonretroactive application of the ... statute of limitations here." 404 U.S. at 109.[11]

5. Finally, even if the Court decides that *Chevron Oil* does not require prospective-only application, the filing period should be equitably tolled, as it was in *Luna v. Dep't of HHS*, 948 F.2d at 172-73, the case which the Secretary contends properly resolved the timeliness issue here. Noting that *Luna* tolled the limitations period

[11] The majority of courts that have considered the issue have applied *Melkonyan*'s sentence-four dicta prospectively only. *See, e.g., Sargent v. Sullivan*, No. 90-1521 (4th Cir. Aug. 22, 1991)(unpublished); *Mendez v. Sullivan*, 792 F. Supp. 375, 378 n.2 (E.D. Pa. 1992)(alternative holding); *Green v. Sullivan*, 788 F. Supp. 275, 276-78 (W.D. Va. 1992); *Sansano*, 788 F. Supp. at 222-25; *Bacon*, 786 F. Supp. at 438-41; *Thomas for Brown*, 785 F. Supp. at 791-93; *Rollins*, 784 F. Supp. at 256-58; *Lopez v. Sullivan*, 780 F. Supp. 496, 504 (N.D. Ill. 1991); *Santiago v. Sullivan*, 783 F. Supp. 223, 225-26 (E.D. Pa. 1992); *Butts v. Bowen*, 775 F. Supp. 1167, 1171-72 (N.D. Ill.), *reaffirmed*, 778 F. Supp. 453, 453-54 (N.D. Ill. 1981). *But see, e.g., Harpster v. Sullivan*, 793 F. Supp. 618, 621-22 (W.D. Pa. 1991)(would not be applied retroactively under *Chevron Oil* factors, but *Beam* requires retroactive application).

because the district court's remand order purported to retain jurisdiction, the Secretary argues cryptically that there is "no comparable predicate for an estoppel claim" here (Pet. 17 n.9). Actually, the situation here is quite similar to that in *Luna*, since the district court here did not enter judgment, but simply denied *both* parties' motions for summary judgment (Pet. App. 27a), thus evincing an obvious intent to retain jurisdiction (which made sense, as *Hudson* indicates, since that was the law at the time the district court's remand order was issued).

But it is the *Secretary's* actions that are most troubling. The Secretary promised in *Brown*, *supra*, that he would return to the court in *every* remanded case for entry of judgment, so that EAJA applications could be considered in an orderly fashion. The Secretary issued regulatory commentary to the same effect. 54 Fed. Reg. at 37,791 (claimants have absolute right to return to court after administrative decision on remand). It defies reason to suggest, as the Secretary does here, that respondent should be denied a fee after having taken actions fully consistent with the Secretary's own policies. Thus, there is more than sufficient reason to toll the statute of limitations in this case.[12]

* * *

If nothing else, this discussion amply illustrates that summary disposition is wholly inappropriate for a case of this complexity. But that does not mean that this Court should become embroiled in these issues so soon after *Melkonyan*, rather than allowing fee applicants and their attorneys to follow the applicable rules in their jurisdictions. If the problem is as important as the Secretary

[12] *See also Boronat v. Sullivan*, 788 F. Supp. 557, 561 (S.D. Fla. 1992)(equitable tolling); *Misciagno v. Sec'y of HHS*, 786 F. Supp. 1120, 1126 (E.D.N.Y. 1992)(relieving claimant from sentence-four judgment on account of surprise, inadvertence, or excusable neglect); *Ground v. Sullivan*, 785 F. Supp. 1407, 1410 & nn.2 & 3 (S.D. Cal. 1992)(declaring prior judgment null and void, thus establishing timeliness of claimant's application); *Robinson v. Sullivan*, 783 F. Supp. 245, 248 (E.D.N.C. 1991).

says it is, Congress will surely agree and fix it. Meanwhile, the Court should leave this situation alone.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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October 16, 1992

DEPARTMENT OF
HEALTH AND HUMAN SERVICES
Social Security Administration
OFFICE OF HEARINGS AND APPEALS

SSN: [omitted]

[Claimaint's name
[and address omitted]

Date mailed: MAY 29 1992

[Attorney's name
[and address omitted]

NOTICE OF ADMINISTRATIVE
LAW JUDGE DECISION
PLEASE READ CAREFULLY

Enclosed is the Administrative Law Judge's decision on your claim. This notice gives you information about what you can do if you disagree with the decision. Please read this notice and the decision carefully.

If You Disagree With The Decision

If you disagree with the Administrative Law Judge's decision, you may appeal to the Appeals Council. You must do this by filing written exceptions. Exceptions are your statements explaining why you disagree with the decision of the Administrative Law Judge.

- Mail the written statement of your exceptions to the Appeals Council, Office of Hearings and Appeals, P.0. Box 3200, Arlington, VA 22203.
- You must file your written exceptions **within 30 days** from the date you receive this notice. The Appeals Council will assume that you received the notice within five days after the date at the top of this notice unless you show you did not receive it within the five-day period.
- If you need more time to file your written exceptions, you must file a written request for additional time with

the Appeals Council within 30 days of the date you receive this notice. If you request more than a 30-day extension of time, you must explain why you need the extra time.

- Please **include the Social Security number(s)** shown on the decision on any paper you send to the Appeals Council.
- The Appeals Council will consider your exceptions and the parts of the decision you think are wrong. The Appeals Council may also consider those parts which you think are correct.
- If the Appeals Council concludes that further action is necessary, it will either return your case to an Administrative Law Judge for further action or issue a decision.
- If the Appeals Council issues a decision, its decision may be either more or less favorable to you than the decision of the Administrative Law Judge.
- If the Appeals Council concludes that the decision of the Administrative Law Judge is correct, it will notify you in writing why your exceptions do not warrant a change in the decision of the Administrative Law Judge.
- If you submit written exceptions and the Appeals Council does not change the decision of the Administrative Law Judge, that decision becomes the final decision of the Secretary after remand.

You Do Not File Written Exceptions

Even if you do not file exceptions, the Appeals Council may review your case on its own motion (within 60 days from the date this notice was mailed). The Appeals Council will notify you if it decides to do so and will advise you what action it proposes to take.

If the Appeals Council does not review the decision on its own motion and you do not file exceptions, we will forward a copy of the decision, and a transcript of the record in your case to the United States Attorney for filing

with the court. You have the right to pursue your civil action with the court.

New Application

You have the right to file a new application at any time, but filing a new application is not the same as filing exceptions to this decision. You might lose benefits if you file a new application instead of filing written exceptions to this decision. Therefore, if you think this decision is wrong, you should file your exceptions within 30 days.

If you have any questions, please contact your local Social Security office. If you visit, please bring this notice and decision with you.

Replaces Form HA-L99-U6